SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1253

BERNARD WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No. .....

BERNARD WILSON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in ..... F.2d ..... A copy of the official opinion in this case is appended hereto as Appendix A.

(b)

GROUNDS OF JURISDICTION

The decision and opinion sought to be reviewed is that rendered in the case of Bernard Wilson v. United States of America, Case Number 26,074, and is dated March 17, 1969.

The jurisdiction of this Court is invoked under 28 **United States Code** § 1254 (1), and under and by virtue of Title 18 **U.S.C.** § 3772, within the time provided for in Rule 11 and Rule 22 (2) of the **Rules of Practice and Procedure of the Supreme Court of the United States.**

The appellant Wilson invokes the jurisdiction of this Court because the United States Court of Appeals for the Fifth Circuit has decided important questions of Federal law and questions of gravity and importance in the administration of criminal justice which have not been settled by this Court, but which should be settled by this Court. The Court of Appeals has minconstrued and has applied decisions of this Court respecting the application of legal principles, and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTION PRESENTED FOR REVIEW

Is a timely assertion of the privilege against self-incrimination provided for in the Fifth Amendment to the Constitution of the United States a complete defense to a charge of possession of an unregistered distillery under 26 **U.S.C.** § 5601 (a) (1)?

(d)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fifth Amendment to the Constitution of the United States provides that

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Title 26 § 5601 (a) (1), **United States Code,** provides that

> "Any person who has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by § 5179 (a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

Title 26 § 5179 (a), **Unittd States Code,** provides that

> "Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and tht purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for the distillation, re-

distillation, or recovery of distilled spirits are not required to be registered under this section)."

(e)

STATEMENT OF THE CASE

On February 7, 1968, the petitioner, Bernard Wilson, and one Hendrix Richardson were indicted in the United States District Court for the Middle District of Alabama for the offense of unlawfully, wilfully, and knowingly having in their possession and custody, and under their control, a still and distilling apparatus set up, which was not registered as required by 26 **U.S.C.** § 5179. The offense was alleged to have been committed on or about the 12th of 13th days of November, 1967. On March 12, 1968, both defendants moved to dismiss the indictment, and, further, to suppress any evidence which might be adduced in support of the indictment. The theory of both motions was (1) that compliance with the registration statute (26 **U.S.C.** § 5179 (a)) would require self-incrimination; and (2) that compliance with the statute under which they were indicted (26 **U.S.C.** § 5601 (a) (1) would require self-incrimination, both contrary to the privilege provided for in the Fifth Amendment to the Constitution. (Record, pages 6-8).

Both motions were denied by the Court on March 15, 1968. Both defendants pleaded "Not Guilty." On April 1, 1968, both defendants were tried together before a jury, and both were convicted the same day. Richardson did not appeal. Wilson did appeal. (Record, pages 152, 153).

The Court of Appeals affirmed. The opinion rendered on affirmance by the Court of Appeals is appended as Appendix A to this petition. The trial court also ren-

dered an opinion. It is made Exhibit B to this petition, as required by Rule 23 of the rules of this Court.

Jurisdiction of the trial court rested upon Article III of the Constitution of the United States. This case is a case arising under the Constitution and laws of the United States. The particular laws are those set out in 26 **U.S.C.** § 5179 (a) and in 26 **U.S.C.** § 5601 (a) (1).

REASONS FOR GRANTING THE WRIT

The petitioner contends that the decision of the Court of Appeals in this case is contrary to the decisions of this Court in **Grosso v. United States,** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed. 2d 906, **Marchetti v. United States,** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889, and **Haynes v. United States,** 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed. 2d 923.

These decisions rest on the rule announced in **Albertson v. Subversive Activities Control Board,** 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed. 2d 165, to the effect that if one makes a timely assertion of his constitutional privilege against self-incrimination, he may not be required to perform an act which under the circumstances then prevailing would compel him to incriminate himself. And these decisions are concerned with the question of whether certain statutes requiring tax returns or registration do in effect compel the taxpayer or registrant to incriminate himself.

In this cause, the statutes in question are 26 **U.S.C.** § 5179 (a) and 26 **U.S.C.** § 5601 (a) (1). The first of these statutes requires registration of a distillery set up for operation, and the second forbids the possession of such a distillery unless it "is registered" as required by the registration statute.

The statutory scheme thus is in many ways similar to that considered (and condemned) in **Haynes v. United States,** 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed. 2d 923. In **Haynes** this Court decided that the firearms registration statute (26 **U.S.C.** § 5841) and the possession statute (26 **U.S.C.** § 5851) must be construed together and rejected the Government's insistence upon a kind of legalistic dichotomy under which a prosecution under the possession statute may be maintained, even though the enabling registration statute is invalid and therefore unenforceable.

The separation of the statutes is expressed in the decisions of the Courts of Appeal cited by this Court in **Haynes,** in 88 S.Ct. 722, 727, Note 7, where this Court then said, in the cited footnote that

> "None of these cases, however, undertook an extended examination of the relationship between [26 **U.S.C.**] §§ 5851 and 5841."—**Haynes v. United States,** 390 U.S. 85, 88 S.Ct. 722, 727n., 19 L.Ed. 2d 923.

Since the decision of this Court in the **Haynes** case, the Court of Appeals for the Fifth Circuit has had before it on at least two occasions the same kind of question as that raised here by the petitioner. But the question has arisen in separate prosecutions, one under the registration statute and the other under the possession statute. These decisions are the following:

> **Anderson and Southern v. United States** (1968) 403 F.2d 207
>
> **Thornburg v. United States,** (Fifth Circuit, Case Number 25,562, decided February 4, 1969) ..... F.2d .....

In the **Anderson and Southern** case the defendant

had been indicted on a number of charges, including a charge of violating the possession statute (26 **U.S.C.** § 5601 (a) (1)). In the opinion there is no real discussion of the constitutional issue raised by the petitioner here, though the **Anderson** case is cited by the Court of Appeals in its decision affirming the conviction of this petitioner (See Appendix A).

So, also, in the **Thornburg** case, the Court side-steps the constitutional issue, simply saying that "the registration and tax statutes governing distilleries and distilled spirits do not impose the danger of self-incrimination."— **Thornburg v. United States,** ..... F.2d .....

But the same court, in an opinion by District Judge Frank M. Johnson, Jr., sitting as a Circuit Judge, in **Shoffeitt v. United States** (5th Circuit, 1968) 403 F.2d 991, certiorari denied, 27 L.W. 3304, February 24, 1969 (No. 868), decided that there was no question of self-incrimination in a case involving a mere possessor who did not owe the tax and **who was under no obligation to register.** It is obvious that Judge Johnson thought that if there had been an obligation to register, the Fifth Amendment privilege against self-incrimination might have been found to be a complete defense.

Anderson dealt with the registration statute; **Thornburg** dealt with the possession statute. The Court of Appeals for the Fifth Circuit has consistently declined to consider both statutes together. The indictment of this petitioner, however, requires both statutes. The Court of Appeals has simply refused to apply to these distilling statutes the construction given by this Court to the firearms statutes in **Haynes.** A subsidiary question, subsumed under the basic question, is why the Court of Appeals will not here apply the rationale devised by this Court in **Haynes.**

The appellant has found no case which construes

the distillery registration and possession statutes together, as this Court construed the firearms statutes together in **Haynes.**

It was the trial judge's opinion (See Appendix B and the Record, commencing at page 160) that the **Haynes, Marchetti,** and **Grosso** decisions are not applicable, since he considered (1) that the Congressional purpose in enacting the distillery statutes was not to coerce information, and (2) that the statutes were not directed principally toward persons inherently suspect of criminal activities, but toward all distillers (Record, pp. 161-164, and Appendix B).

However, the trial judge recognized that compliance by the petitioner would have the effect of coercing from the petitioner evidence to be usd in prosecuting him under Alabama law (Record, p. 163, and Appendix B).

As the trial judge said, "the legislation establishing the state's Alcoholic Beverage Control Board expressly saved the prohibition era laws 'relating to manufacture or possession of illicit distilled liquor . . . or apparatus for the manufacture of same.' Code of Alabama, Title 29, Section 75 (Recomp. 1958). Thus it is illegal for 'any person, firm, or corporation' to manufacture whiskey in Alabama., Title 29, Section 103." (Record, p. 163, and Appendix B).

The text of the state statutes cited by the trial judge are appended to this petition as Appendix C.

The petitioner's argument is that while the distillery statutes do coerce information from both the guilty and the innocent, they nevertheless require the guilty to confess their guilt, and that the Fifth Amendment to the Constitution forbids this result.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted and that this Court should determine that the Court below erred in the respects herein urged.

Respectfully submitted,

Roberts A. Brown

Knox M. McMillan

Attorneys for the Petitioner

APPENDIX A

APPENDIX V

APPENDIX A

IN THE

United States Court of Appeals For the Fifth Circuit

No. 26074

BERNARD WILSON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Middle District of Alabama

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(March 17, 1969)

ON MOTION OF APPELLEE FOR SUMMARY AFFIRMANCE

Before RIVES, BELL and DYER, Circuit Judges.

PER CURIAM: The sole issue presented on this appeal is whether the appellant's assertion of his Fifth Amendment privilege against self-incrimination is a defense to a charge of possession of an unregistered distillery under 26 **U.S.C.** § 5601 (a) (1). That question

has heretofore been answered by this Circuit in the negative[1].

The motion is therefore granted[2] and the judgment of conviction is affirmed.

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[1] SEE *Thornburg v. United States,* ..... F.2d ..... [No. 26562, Feb. 4, 1969] (distillery); *Hall v. United States,* ..... F.2d ..... [No. 26774, Jan. 30, 1969] (non-tax-paid whiskey); *Shoffeit v. United States, 5 Cir.* 1968, 403 F.2d 991, *cert. denied* 27 L.W. 3304, Feb. 24, 1969 [No. 868] (whiskey containers); *Anderson & Southern v. United States,* 5 Cir. 1968, 403 F.2d 207 (distillery, non-tax-paid whiskey, etc.); *Brown v. United States,* 5 Cir. 1968, 401 F.2d 769 (containers).

[2] SEE Fifth Circuit new Rule 19 adopted on December 6, 1968; COMPARE *Groendyke Transport, Inc. v. Davis,* 5 Cir. 1969, ... F.2d ..... [No. 26812, Jan. 2, 1969].

APPENDIX B

Filed April 25, 1968

In the United States District Court for the Middle District of Alabama, Eastern Division

UNITED STATES

versus

HENDRIX RICHARDSON, BERNARD WILSON

Criminal Case No. 2416-E

UNITED STATES

versus

RAYMOND BEASON, TOM BEASON, EDGAR LEE WHATLEY, EDWARD REED WHATLEY, RUFUS WYCKOFF, FRANK MOODY

Criminal Case No. 2420-E

UNITED STATES

versus

RAY EDWARD DAVIS

Criminal Case No. 2422-E

The defendants in these cases were indicted and charged with having in their possession or control unregistered stills in violation of 26 U.S.C. Sec. 5601 (a) (1). Acting upon the suggestion made in Chief Justice Warren's dissent in Marchetti v. United States, ... U.S. ....., 19 L.Ed. 2d 889 (1968); Grosso v. United States,

..... U.S. ....., 19 L.Ed. 2d 906 (1968); and Haynes v. United States, ... U.S. ....., 19 L.Ed. 2d 923 (1968) that those decisions are "opening the door to a new wave of attacks on a number of federal registration statutes whenever the registration requirement touches upon allegedly illegal activities," Grosso, 19 L.Ed. 2d at 921, the defendants moved to dismiss the indictments contending that the registration requirements imposed by 26 U.S.C. 5179 (a) violate their Fifth Amendment privilege against self-incrimination.

Although the majority opinions in Marchetti and Grosso "assumed" that the government's principal interest in the occupational and excise taxes on gambling there involved was "the collection of revenue, and not the prosecution of gamblers." 19 L.Ed. 2d 912, it is apparent that the Court was deeply concerned with the constitutional validity of a statutory scheme designed to obtain information which would be turned over to the state and federal prosecutors. 26 U.S.C. Sec. 6107 specifically requires that an alphabetical list of all persons paying the occupational tax on gambling be kept in the district internal revenue offices and furnished upon request to "any prosecuting officer of any State, county, or municipality." Although no express statutory instruction requires similar reporting with regard to those paying the excise tax on wagering, the Court observed that:

> ". . . the Revenue Service, evidently acting under the authority of certain general statutory provisions, has undertaken to tender this information to interested prosecuting authorities." 19 L.Ed. 2d 911.

The Court's concern that the registration requirements reflected "a significant element of Congress' purposes," in aiding enforcement of state gambling prohibitions, Marchetti, 19 L.Ed. 2d 904, was bolstered by

the fact that most forms of unorganized gambling were exempted from the operation of the federal statutes with the effect that they applied "almost exclusively to illegal, organized gambling." Concurring opinion of Mr. Justice Brennan, 19 L.Ed. 2d at 916. Thus, in large part, the constitutional infirmity of the registration requirements in the gambling cases, like those involved in Haynes, supra, concerning the registration of certain widely prohibited firearms, is that the statutes were directed only toward a very narrow group of persons "inherently suspect of criminal activities," in "an area permeated with criminal statutes." Grosso, 19 L.Ed 2d 910. The Court was very careful to distinguish United States v. Sullivan, 274 U.S. 259, 71 L.Ed. 1037 (1927) dealing with the filing of income tax returns, and the required records doctrine embodied in Shapiro v. United States, 335 U.S. 1, 92 L.Ed. 1787 (1948) observing that:

> ". . . the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory of general application." Haynes, 19 L.Ed. 2d 933.

While the Court could not discern such a general regulatory program in the registration requirements involved in Marchetti, Grosso, and Haynes, (one Justice found a clear "congressional purpose to gather evidence from citizens in order to secure their conviction of crime," concurring opinion of Mr. Justice Brennan, 19 L.Ed. 2d 917) it is obvious that the registration provisions concerning the taxation of the liquor industry do serve a legitimate regulatory purpose in protecting a major source of revenue. They are not directed at a highly selective group inherently suspect of criminal activity, but apply to all persons, even states and municipalities, which engage in activities connected with distilled spirits. State of Ohio v. Helvering, 292 U.S. 360, 78 L.Ed. 1307 (1934).

Justice Brennan observed that in situations not in-

volving statutory systems "manifesting a patent violation of the privilege" against self-incrimination, the determination of constitutionality would be more difficult. 19 L.Ed. 2d 917. That predicted difficulty arises in these cases. The government has a legitimate regulatory purpose in enforcing its registration provisions pertaining to the liquor industry. The Congressional purpose in enacting these requirements was to facilitate collection of taxes, not to coerce evidence from persons engaged in illegal activities for use in their prosecutions. As it happens, however, that could be the effect of compliance in Alabama, for the legislation establishing the state's Alcoholic Beverage Control Board expressly saved the prohibition era laws "relating to manufacture or possession of illicit distilled liquor . . . or apparatus for the manufacture of same." Code of Alabama, Title 29, Section 75 (Recomp. 1958). Thus it is illegal for "any person, firm, or corporation" to manufacture whiskey in Alabama. Title 29, Section 103.

The statutory scheme as enacted by Congress is not to compel suspected criminals to confess their crimes. Alabama's prohibition cannot, however, deprive Congress of its long recognized interest in obtaining revenue from the taxation of illegal activities. In providing for registration provisions to protect the collection of that revenue Congress did not direct any federal officer to assist in enforcing any state's prohibition laws,[1] and there are no established procedures in force for notifying state authorities of the names of registrants.

Since there is no Congressional policy against manufacturing whiskey, there is no basis, as there was in the gambling cases, for not permitting the United States to continue to enforce the registration provisions while imposing restrictions on the use of information obtained

[1] Cf. 18 U.S.C. Sections 1262 and 1265 applying to shipments into "bone dry" states.

as a consequence of compliance. The United States urged this solution in Marchetti, and the Court observed that this suggestion was "in principle an attractive and apparently practical resolution of the difficult problem before us." 19 L.Ed. 2d 903. The Court, in fact, had previously given its approval to such an approach in Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed. 2d 678 (1964). It was not accepted in Marchetti because of the apparent Congressional interest, as manifested in 26 U.S.C. Section 6107, in aiding state prosecutions by passing on information obtained through the registration process:

> "We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes. . . . We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to his Court, the task of striking an appropriate balance among such values." 19 L.Ed. 2d 904.

No such conflict in Congressional policy exists with regard to the registration statutes involved here. A review of the history, purpose, and operation of the federal liquor laws indicates that they are not subject to the objections expressed in the opinions of the Court in Marchetti, Grosso, and Haynes. Distilled spirits and other liquors have been subject to federal taxation since 1791. 1 Stat. 203. Substantial revenue for both the state and federal governments has been derived in modern times from various taxes imposed on liquor.

The Supreme Court has recognized that the detailed statutory scheme found in the internal revenue laws with respect to distilled spirits has the purpose of protecting

the revenue and insuring the collection of the taxes imposed. In United States v. Ulrici, 111 U.S. 38, 28 L.Ed. 344 (1884) the Court stated:

> It is clear even, upon a cursory reading, that the well considered and minute provisions of the Revised Statutes found in chapter 4 entitled "Distilled Spirits," of Title XXXV entitled "Internal Revenue" were adopted WITH ONE PURPOSE ONLY, namely: TO SECURE THE PAYMENT OF THE TAX IMPOSED by law upon distilled spirits.

All the regulations for the manufacture and storage, the marking, branding, numbering and stamping with tax stamps of distilled spirits, and all the penalties, forfeitures, fines and imprisonments prescribed by the chapter mentioned HAVE THAT END ONLY IN VIEW. (Emphasis added). Id. at 40, 28 L.Ed. 345.

Throughout Title 26 of the U.S. Code there are various statutes which are part of the stringent qualifications and controls designed to protect the sources of revenue derived from the taxation of liquor. E.g. 26 U.S.C. Section 5105 (a), obtaining a permit to set up a still; Section 5179 (a), registering a still which is set up; Section 5171 and 5172, registering as a proprietor of a distilled spirits plant before engaging in the business of a distiller; Section 5173, filing a bond before commencing the business of a distiller; Section 5178, obtaining approval of the location, construction, and arrangement of a distilled spirits plant. All of these statutes are integral parts of the comprehensive taxing scheme.

Thus, since it appears that the statutory scheme is not to compel suspected criminals to confess their crimes, but to protect a public interest in the collection of taxes, the Court concludes that the Marchetti, Grosso, and

Haynes decisions do not require the dismissal of these indictments.

An order in accordance with this opinion has previously been entered in each of these cases.

Done, this the 23 day of April, 1968.

VIRGIL PITTMAN,
United States District Judge.

APPENDIX C

APPENDIX C

§ 75. Laws prohibiting manufacture and possession of illicit liquor not repealed.—Nothing contained in this chapter shall be construed as repealing any of the laws of Alabama relating to the manufacture or possession of illicit distilled liquor or apparatus for the manufacture of same, nor any law now fixing fees to officials for the enforcement of any and all laws but the same shall remain in full force and effect. (1936-37, Ex. Sess., p. 40.)

§ 103. (4627) Distilling or manufacturing prohibited liquors; penalty for violating.—Any person, firm, or corporation who shall, within in this state, distill, make or manufacture any alcoholic, spiritous, malted or mixed liquors or beverages, any part of which is alcohol, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment at hard labor in the penitentiary for not less than one year nor longer than five years, to be fixed within these limits by the court. (1919, p. 6)

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of Bernard Wilson were deposited in the United States Post Office with first-class postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington 25, D. C.; and to Honorable Ira DeMent, Acting United States District Attorney for the Middle District of Alabama, Post Office Building, Montgomery, Alabama; and to "United States District Attorney for the Middle District of Alabama," Post Office Building, Montgomery, Alabama.

This the 10th day of April, 1969.

Louis M McMillan
of Counsel for the Petitioner

P. O. Box 1709
Auburn, Alabama 36830

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1253

BERNARD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinion of the district court (Pet. App. B) is reported at 284 F. Supp. 419.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1969. The petition for a writ of certiorari was filed on April 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the privilege against self-incrimination is a defense to a charge of possession of an unregistered distillery.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing an unregistered distillery, in violation of 26 U.S.C. 5601(a)(1). On April 5, 1968, he was sentenced to imprisonment for three years. The court of appeals affirmed per curiam (Pet. App. A).

The evidence against petitioner at trial consisted of the testimony of five Alcohol and Tobacco Tax Division agents who on November 11-12, 1967, had conducted a surveillance of an illicit distillery located in a woods near Borum, Alabama. Petitioner, co-defendant Hendrix Richardson,[1] and an unidentified third man were observed operating the distillery and producing 80 gallons of moonshine whiskey.

Prior to trial petitioner moved to dismiss the indictment, alleging that compliance with the registration requirements of the federal liquor laws would have compelled him to incriminate himself. The motion was denied. In an opinion filed after the trial, the district court found that the registration requirements of the liquor laws serve a legitimate regulatory purpose in protecting a major source of federal revenue, and are not directed at persons inherently sus-

[1] Richardson was also convicted but did not appeal.

pect of criminal activities. The Court concluded, therefore, that the principles expressed in the *Marchetti*, *Grosso*, and *Haynes* decisions[2] did not control this case (Pet. App. B 1-7).

ARGUMENT

Petitioner was indicted and convicted under 26 U.S.C. 5601(a)(1) (Pet. 3), which prohibits possession by "any person" of a still which is not registered under 26 U.S.C. 5179(a). Assuming *arguendo* that petitioner correctly argues (Pet. 6) that under *Haynes* the registration requirements of Section 5179 (a) are relevant to his conviction, his contentions must still fail. As the district court fully explained in overruling petitioner's self-incrimination claim as unfounded in this record, there are compelling differences between the liquor laws and the wagering tax and firearms statutes, which render the principles announced in *Marchetti*, *Grosso*, and *Haynes* inapplicable to a prosecution for failing to register a distillery (assuming, we reiterate, that this was in effect the substance of petitioner's offense).

This Court long ago recognized that taxation of the liquor industry was lawful and that the sole purpose of the comprehensive liquor tax statutes was to assure the collectability of the taxes. *United States* v. *Ulrici*, 111 U.S. 38, 40. Taxation of liquor began in 1791 (1 Stat. 203); the present laws have changed little since 1868 (15 Stat. 125). Prior to the adoption of

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[2] *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85.

the Sixteenth Amendment, taxes derived from distilled spirits provided one of the principal sources of federal revenue. Today, though far outstripped by the income tax, the revenue from the distilled spirits tax still contributes a substantial amount to the federal treasury —more than four billion dollars annually.

The Court in *Marchetti*, *Grosso*, and *Haynes* carefully pointed out that the wagering and firearms tax statutes were so structured that their impositions fell primarily, if not exclusively, on persons whose involvement in the taxed activity was illegal under other federal or state laws. By contrast, dealing in distilled spirits is lawful to some extent in every state. See *Brown* v. *United States*, 401 F. 2d 769 (C.A. 5). These taxing statutes therefore were not inserted into an area permeated with criminal statutes [except, of course, those directed to protection and collection of revenue]. Individuals involved in this industry cannot be termed a "highly selective group inherently suspect of criminal activities," but rather are persons whose activities appropriately give rise to an "essentially non-criminal and regulatory area of inquiry". See *Haynes* v. *United States*, 390 U.S. 85, 98-99; *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79. The laws relating to distilled spirits have never been deemed to serve as a disguise for obtaining incriminating disclosures. The information required to be divulged by a distillery operator is limited to the collection of data necessary for efficient administration of a major revenue program. Unlike the situation in the gambling and firearms tax areas, registrants who comply with the liquor tax requirements

have no basis for fearing that their disclosures will confront them with "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination". *Marchetti, supra*, 390 U.S. at 53. As the district court observed (Pet. App. B 4), there is no congressional policy against the manufacture of whiskey and no evidence of any intent to use federal tax information to facilitate enforcement of any local liquor laws.

Petitioner urges, however, that in *his* case, registration would have been incriminating because the state of Alabama generally prohibits the manufacture of liquor. This Court has not suggested, however, that the validity and enforceability of a broadly based and uniformly applied federal statute designed for a legitimate purpose can be set at naught by the variety of state law. Furthermore, we know of no instances where evidence of the registration required by 26 U.S.C. 5179 has been utilized in the prosecution of state cases for violation of their local liquor laws. Petitioner himself has not been indicted by the state of Alabama, and there is no reason to speculate that he will be. Thus, even when we focus on petitioner's precise situation, local prohibition of his conduct cannot be said to have made the self-incrimination hazards of fulfilling his federal obligations "real and appreciable" rather than "imaginary and unsubstantial." *Marchetti, supra*, 390 U.S. at 48.[3]

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[3] But even if a state or locality should endeavor to prosecute a person on the basis of information obtained from his federal registration, the appropriate remedy would be, as the district court commented (Pet. App. B 4-5), to impose restric-

CONCLUSION

The petition for a writ of certiorari should be denied.

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MAY 1969.

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tions on the use of such disclosures for a criminal proceeding. See *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 78-79. There is no occasion now to anticipate that improbable event.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1253

BERNARD WILSON, PETITIONER

versus

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S PETITION FOR REHEARING

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PETITIONER'S PETITION FOR REHEARING

Pursuant to the provisions of Rule 58, paragraph 2, the petitioner Bernard Wilson prays for rehearing of his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. His petition was denied by order of this Court made and entered May 26, 1969.

The petition for rehearing is based upon intervening circumstances of controlling effect and other substantial grounds available to the petitioner, although not previously presented. The latter were to have been the subject matter of a reply brief which was in the hands of petitioner's printer at the time the writ was denied.

In substance the grounds of this petition are the following: (1) one aspect of the decision of this Court in **Leary v. United States,** 37 L.W. 4397 (May 19, 1969); and (2) the circumstance that a State officer participated in the raid which resulted in the arrest of the petitioner, showing that in fact there would have been substantial risk of self-incrimination if petitioner had registered the distillery mentioned in the record and other related matters appearing in the Government's **Brief in Opposition.**

(1)

"Persons inherently suspect of criminal activities . . ."

In the **Leary** decision this Court noted that there were several classes of persons who might lawfully possess marijuana, under specific exceptions provided for in the various state laws relating to marijuana, and that these persons were required to register or were exempt from the registration requirements. This Court went on to say that those persons "who might legally possess marijuana under state law were virtually certain either to be registered under Section 4753 or to be exempt from the order form requirements." (**Leary v. United States,** 37 L.W. 4397, 4400, (subdivision C). And the Court

found that all other possessors who were both unregistered and obliged to obtain an order form constituted "a select group inherently suspect of criminal activities."

The petitioner says that if this principle is applied to enforcement of the Federal distillery registration statutes in Alabama, it must follow **a fortiori** that **all persons** possessing distilleries in Alabama must be considered to be part of a select group inherently suspect of criminal activities, since no one may lawfully possess a distillery in Alabama (Title 29, Sections 75, 131, 133, **Code of Alabama,** 1940).

Undoubtedly the number of distillers throughout the country who willingly register must be considerable, and they are well known. However, the number of moonshine distillers is simply legion, as everyone who has practiced law in the Eastern United States is bound to know. These moonshiners, who operate in secret and in defiance of the law, are the persons against whom the registration statues are intended to apply, and obviously they are a "select group inherently suspect of criminal activity." Though they may be among the "guilty and imprudent,"[1] they are entitled to the protection of the Fifth Amendment.

(2)

"Appreciable hazards of self-incrimination . . ."

The original petition for certiorari did not call to

[1]See *Marchetti v. United States,* 88 S.Ct. 697, 704, headnotes 4 and 5, where it is said, "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted."

the Court's attention the fact that when the distillery described in the record was raided, there was a State officer named Wooten present and assisting the Federal officers (See the Record, Volume I, pages 29 and 77). Wooten was then (and still is) engaged in police work for the State of Alabama, and in particular for the State Alcoholic Beverage Control Board. It is not unusual for state officers to assist Federal officers in the enforcement of the Internal Revenue laws. Presumably, in this instance, it became Wooten's duty to inform the State authorities of the distillery. The Government's statement, in its brief, that petitioner has not been indicted under state law is not supported by the record.

It is argued by the Government that the information required of a registrant is only what is necessary "for efficient administration of a major revenue program." At the same time, the statute calls for every item of information necessary to draw an indictment for violation of the registration statutes, and in particular 26 **U.S.C.** 5601. A reading of the indictment in this case (**Record,** Volume I, page 5) clearly shows that the District Attorney who prepared the indictment adopted much of the precise language of the statute. He needed only to supply time and place.

Beside the point, also, is the Government's argument that the Solicitor-General knows of no instance where evidence furnished by registration of a distillery has been used in a state prosecution. It is doubtful, also, that he knows of any taxpayer who, in the words of Mr. Justice Holmes, has had the temerity to raise the question of whether bribes paid in the carrying on of illegal businesses constitute items of "ordinary and nec-

essary expenses" within the meaning of the income tax laws.[2]

Too, there is no restriction on the use of any information which a registrant might supply in complying with 26 U.S.C. 5179 (a) (1). And the Government in its brief (footnote on page 5) renews its request for the imposition of appropriate restrictions, thus recognizing that compliance with these registration statutes would create "appreciable hazards of self-incrimination."

For the foregoing reasons, the petitioner respectfully prays that the Court reconsider the order of May 26, 1969, denying his original petition and grant the writ prayed for in his original petition.

The undersigned attorneys do hereby certify that this petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds specified in paragraph 2 of Rule 58 of the Supreme Court Rules.

Respectfully submitted this 16 day of June, 1969.

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[2]See *United States v. Sullivan*, (1927) 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037, 51 A.L.R. 1020.

CERTIFICATE OF SERVICE

The undersigned, who is of counsel for the Petitioner, does hereby certify that true copies of the foregoing petition for rehearing were deposited in the United States Post Office with first-class, airmail postage prepaid, addressed to Honorable Erwin N. Griswold, the Solicitor-General of the United States, Department of Justice, Washington, D. C. 20530, and that copies were mailed, first-class postage prepaid, addressed to Honorable Ira DeMent, United States District Attorney for the Middle District of Alabama, Post Office Building, Montgomery, Alabama, this the 16 day of June, 1969.

Fred M McMillan

Of Counsel for the Petitioner